U.S. Department of Justice

United States Attorney
District of Massachusetts

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June 17, 1993

BY HAND

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Re: United States v. Thomas A. Shay and Alfred Trenkler, Criminal No. 92-10396-Z

Dear Counsel:

AUSA Libby and I have reviewed your "Motion to Dismiss Multiplicitous Counts." Since there appears to be legal authority suggesting that a jury may be "prejudiced" and have an "inflated view of defendant's wrongdoing" by having multiple similar criminal charges arising out of "one basic incident", see e.g. United States v. Chaney, 559 F.2d 1094, 1096 (7th Cir. 1977), we have decided that the indictment should be revised. Because these changes, described below, in no way serve to broaden the charges, the Court, on motion, could properly amend the indictment. Nevertheless, to avoid any question on the matter, we have decided to seek a superseding indictment from the grand jury.

I have enclosed a copy of a draft superseding indictment in the form that we will present it to the grand jury when they reconvene next week. As you can see, no new substantive charges are added. We have simply merged Counts Two and Three into a single count (844(d)), and also merged Counts Four and Five into a single count (844(i)). If any of you have any difficulties with what the government is proposing, please contact me at your first opportunity.

For the record, the assertion in your Memorandum, on pages 3 and 4, that "An allegation of injury resulting from a violation of §844 is mere surplusage" (citing United States v. Schwanke, 598 F.2d 575, 579 (10th Cir. 1979)) is an incorrect statement of the law. In Schwanke, the court held that Congress did not intend "injury to the criminal himself", without more, to be a sufficient basis for an enhanced criminal penalty under Section 844. Id. at 579. The court stated therefore that the allegation in the indictment in that case ("as a result of said explosion at least one person received and sustained physical injury" in violation of §844(i), id. at 577), which was due to a "misconstruction of the statute" by the government, would be considered "surplusage". Id. at 579.

Since Section 844(d) requires the government to prove "knowledge" and "intent" ... "to kill, injure, or intimidate," and since Section 844(i) requires the government to prove some element of malice or maliciousness, allegations of death or injury in the indictment are fairly standard and appropriate. See e.g. United States v. Metzger, 778 F.2d 1195, 1210 (6th Cir. 1985); United States v. Williams, 775 F.2d 1295, 1296-97 (5th Cir. 1985); United States v. Barton, 647 F.2d 224, 227 n. 1 (2d Cir. 1981); United States v. Monholland, 607 F.2d 1311, 1312 (10th Cir. 1979).

In light of the foregoing, and given the anticipated return of a superseding indictment, I believe your "Motion to Dismiss Multiplicitous Counts" will be rendered moot.

Very truly yours,

A. JOHN PAPPALARDO
United States Attorney

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Enclosure
cc: Honorable Rya W. Zobel
United States District Judge